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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 174.

JAMES STILLMAN, APPELLANT,

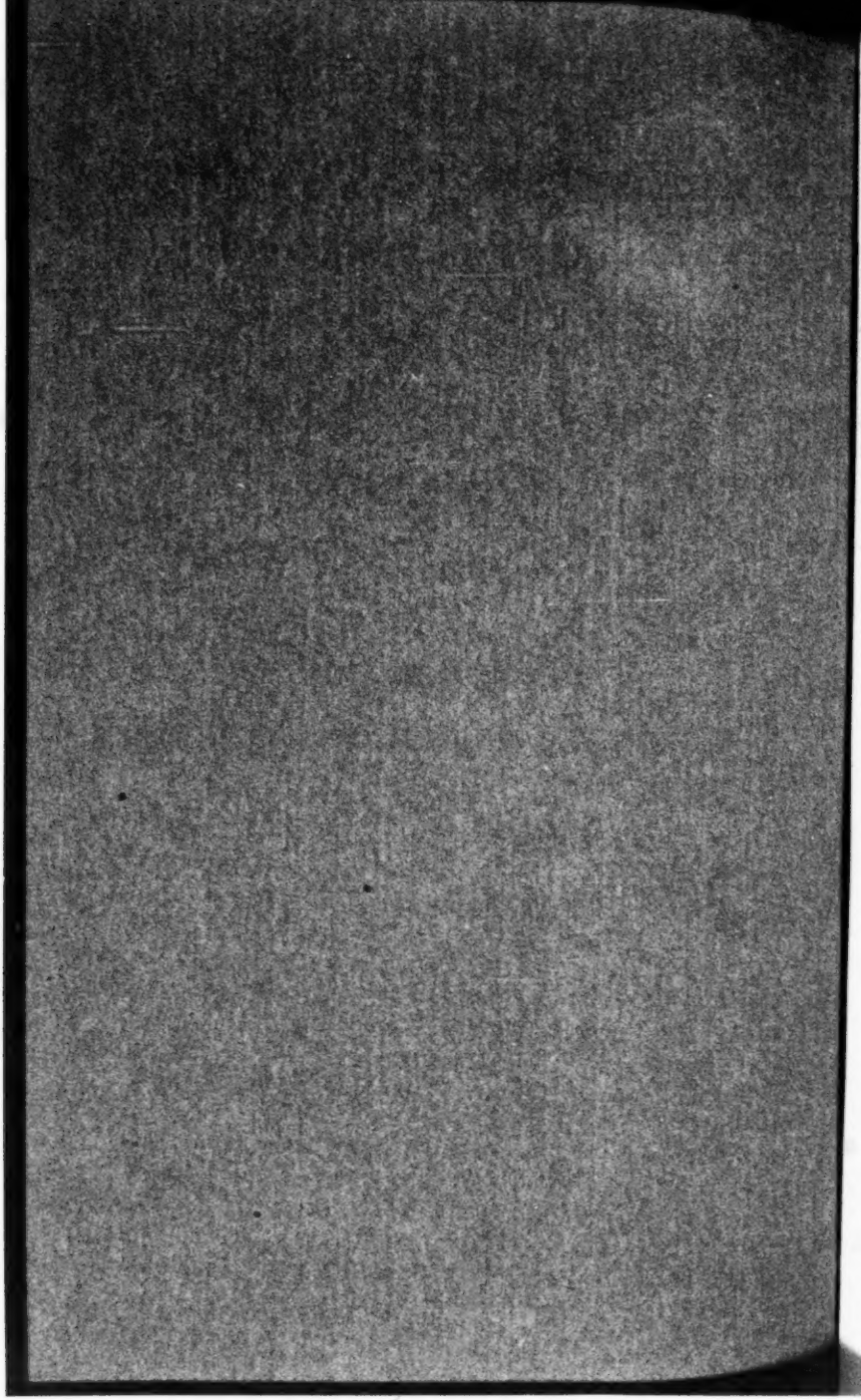
vs.

C. B. COMBE, INDEPENDENT EXECUTOR OF THE ESTATE OF STEPHEN POWERS, DECEASED; C. B. COMBE, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

Brief and Argument for Appellees.

FRED BEALL,
WASHINGTON, D. C.
C. L. BATES,
SAN ANTONIO, TEXAS.
Counsel for Appellees.



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C. B. COMBE, INDEPENDENT EXECUTOR OF THE ESTATE OF STEPHEN POWERS, DECEASED; C. B. COMBE, ET AL., APPELLEES.

BRIEF AND ARGUMENT OF FRED BEALL, WASHINGTON, D. C., AND C. L. BATES, SAN ANTONIO, TEXAS, COUNSEL FOR APPELLEES, C. B. COMBE, INDEPENDENT EXECUTOR OF THE ESTATE OF STEPHEN POWERS, DECEASED, AND C. B. COMBE, FREDERICK J. COMBE, CHARLES B. COMBE, JR., FRANK B. COMBE, JOSEPH K. COMBE AND EMIL P. COMBE.

STATEMENT OF THE CASE BY APPELLEES' COUNSEL.

I. A QUESTION OF JURISDICTION ONLY INVOLVED IN THIS APPEAL. This case is appealed to this court by James Stillman, who was a defendant below, from a final decree (Rec. 406-415), rendered December 12, 1903, by the Circuit Court of the United States for the Southern District of Texas, Brownsville Division, under Section 5 of the Act of March 3, 1891; and the only question now in issue, as appears from the order of the court granting the appeal, is the jurisdiction of the court below. (Rec. 561-566.)

II. THIS IS A CASE OF ANCILLARY JURISDICTION. The jurisdiction in this case is ancillary; this suit is ancillary to

and dependent upon a certain suit at law, styled, "Heirs of Miguel Salinas vs. William Kellogg et al., No. 248," on the law docket in the said Circuit Court of the United States for the Southern District of Texas, Brownville Division. The final judgment in said suit at law was rendered July 14, 1887; and this present suit was instituted in the same court on June 14, 1897, by appellee, C. B. Combe, independent executor of Stephen Powers, deceased, by the filing of his original bill (Rec. 1-18), with exhibits (Rec. 18-36), against appellant, James Stillman, and one Thomas Carson individually, and as administrator C. T. A. of Maria Josefa Cavazos, and against eighteen other persons, all of them being parties to said former suit at law. In his original bill, the plaintiff alleged in substance the proceedings in the former suit; and on October 29, 1898, he filed an amended bill (Rec. 156-180), making new parties, and attaching thereto as exhibit "E" a certified copy of the entire record in said suit at law, the language of said amended bill being: "And the plaintiffs attach hereto a duly certified copy of the record in said suit No. 248, on the law docket of this court, marked exhibit E, and here now referred to and made part of this amended bill." (Rec. 163.) But the clerk, in printing this record, in a note says: "Note.—Exhibit, next in order to the foregoing document is not copied because the same consists of part of the record in No. 248, and is hereinafter copied in full," (Rec. 180); and said exhibit E is found in the record on pages 415-457. On May 1, 1899, plaintiffs further amended their bill. (Rec. 306-320.)

III. The Jurisdictional Facts Averred and Proved by Plaintiffs. The plaintiffs (appellees) averred and proved the following jurisdictional facts to sustain their contention that the lower court had ancillary jurisdiction of this suit in equity, namely:

1. In the year 1846, the United States took possession of a tract of land, which was private property, situated in Cameron County, Texas, (since known as Fort Brown Reservation), and have since held it as a military reservation, but never paid for it nor acquired title to it, until after March 3, 1885, on which date congress appropriated $160,000.00 to enable the Secretary of War to acquire "a good and valid title" to the land and pay for its use and occupation, and providing "that no part of this

sum shall be paid until a complete title is vested in the United States, and the full amount of the price, including rent, shall be paid directly to the owners of the property." (Original Bill Arts. III, IV and VI, Rec. 3-5; Stillman's Answer, Arts. III, IV and VI, Rec. 243-244; Carson's Answer, Arts. II, III and V, Rec. 274-277; 23 U. S. Stats., at L., 507.)

2. On June 29, 1886, nine of the heirs of Miguel Salinas filed suit (trespass to try title) in the District Court of Cameron County, Texas, against Col. William Kellogg, then commanding officer at Fort Brown Reservation, to recover the title and possession of a part of said tract of land; and on June 20, 1886, H. E. Woodhouse intervened in that suit, claiming to have acquired the shares of four of the Salinas heirs in said land; and on the application of defendant, Col. Kellogg, the suit was removed into the Circuit Court of the United States for the Western District of Texas, Brownsville Division (now in the Southern District of Texas); the transcript from the State court having been filed in the Federal court on November 3, 1886, and entered on the law docket of the court as "No. 248, Heirs of Miguel Salinas vs. William Kellogg et al," and was proceeded with as a suit pending in that court. (Original Bill, Art. VII, Rec. 5, 6; Stillman's Answer, Art. VII, Rec. 244; Carson's Answer, Art. VI, Rec. 277; Transcript in suit No. 248, Rec. 415-422.)

3. On December 27, 1886, Rudolph Kleburg, United States district attorney for the Western District of Texas, acting under instructions from the attorney general of the United States, intervened in said suit No. 248 for the United States, and had them made parties defendant therein, and filed answers for defendant Kellogg and the United States, in which he pleaded "not guilty," and set up outstanding title to said tract of land in a large number of persons, among them the appellant, Stillman, and Thomas Carson, administrator of Mrs. Cavazos, and the appellee, C. B. Cambe, executor of Powers, deceased, and also the heirs of said decedent, and caused all of said persons to be made parties defendants to said suit, and citation ordered to be issued to them; and Stillman and Carson and others, in writing, waived citation, and voluntarily entered their appearance and submitted themselves to the jurisdiction of the court in said suit No. 248, and filed pleadings, and those not waiving

process were served with citation. (Original Bill, Arts. VII and VIII, Rec. 5-8; Stillman's Answer, Arts. VII and VIII; Carson's Answer, Art. VI, Rec. 277-279; Transcript in suit No. 248, Rec. 422-428, and 455.)

4. There were twenty-four (24) defendants to said suit at law No. 248, and all of them filed answers, and all, except Kellogg and the United States, filed pleas in reconvention, claiming title to portions of said land, which claims all conflicted with each other, except the claims of Stillman and Carson, they each claiming an undivided one-half interest of the whole; all of said answers and pleas in reconvention (except the answers of Kellogg and the United States) having been filed within three days of each other, the first on July 11, 1887, and the last on July 13, 1887, and the final judgment in said suit having been rendered on July 14, 1887. (Original Bill Art. VIII, Rec. 6-8; Stillman's Answer, Art. VIII, Rec. 244; Carson's Answer, Art. VI, Rec. 277-279; Transcript in suit No. 248, Rec. 429-457.)

5. On July 13, 1887, the day before the entry of final judgment in said suit at law No. 248, the defendant (appellant Stillman) and Carson, administrator, and plaintiff (appellee) Cambe, executor, and nineteen (19) other parties to said suit, entered into a written agreement (exhibit D. to original bill, Rec. 26-30), in which it was, among other things, stipulated, in substance, as follows:

(1) That in the trial of said suit, the issues made by the pleadings therein should not be litigated nor adjudicated, and that the conflicting claims to said land and the fund appropriated to pay for said land, should not be decided upon the trial of said suit, but that a verdict and judgment should be rendered and entered therein by consent, vesting the complete title to Fort Brown Reservation, and all money owing by the United States for its use and occupation, in defendants Stillman and Carson, administrator. (2) That upon securing such verdict and judgment, Stillman and Carson should make the appropriate deed of conveyance, vesting a good and valid title in and to Fort Brown Reservation and the rents in the government of the United States, and should obtain from the Secretary of War a warrant upon the Treasurer of the United States, for the fund of $160,000.00, appropriated to pay for same, and should, without delay, deposit same (less $20,000.00 due for

services) in the bank of Ball, Hutchings & Co. of Galveston, Texas, to the credit of certain arbitrators named in the agreement. (3) And the parties to said agreement thereby submitted their claims to said tract of land (Fort Brown Reservation) and said fund of $160,000.00, and all the issues made by the pleadings in said cause, to the arbitrators named, or others to be chosen, whose decision should be final, and who should, upon their decision, disburse said fund accordingly. (Original Bill, Arts. IX and X, Rec. 8-10; Exhibit D. to Original Bill, Rec. 26-30; Stillman's Answer, Art. X, Rec. 245, admitting execution of the agreement; Carson's Answer, Art. IX, Rec. 281, admitting execution of the agreement.)

6. On July 14, 1887, pursuant to said agreement, exhibit D, a final judgment was entered in said suit No. 248, by consent and upon said agreement, vesting the title to Fort Brown Reservation, and all money due for its use and occupation, in Stillman and Carson, administrator, and they subsequently made a conveyance of the property to the government, and a relinquishment of the claim for use and occupation, and collected the $160,000.00, and carried it to New York City, where the defendant (appellant) Stillman converted the whole of it to his own use, and repudiated his trust in regard thereto; and in the collection and conversion of said fund, Stillman and Carson acted in collusion with each other, and made fraudulent use of said judgment which they had obtained by consent of parties, and upon an agreement to bring said fund to Texas, and abide the decision of abritrators as to its ownership. (Original Bill, Arts. XI, XII and XIII, Rec. 10-15; Exhibit E to Original Bill, Rec. 26-30; Stillman's Answer, Art. XIII, Rec. 246-247; Carson's Answer, Art. XII, Rec. 283-285; Deed of Stillman and Carson to the government, Exhibit F, Rec. 32, 33; Receipt of Stillman and Carson to the government for $160,000.00 Fort Brown Fund, Rec. 2665-285; Stillman's Answer, Rec. 265-269, where he states an account of the fund and admits that he converted the whole of it; Correspondence between District Attorney Kleburg and the Attorney General, showing an agreed judgment, Rec. 472, 473; Testimony of defendant Carson, proving that the final judgment in suit No. 248 was a consent judgment, Rec. 544; Deposition of James R. Cox, answer to 18th Int., Rec. 496, and his answer to the 19th Cross Int., Rec. 500, 501.)

7 Plaintiffs (appellees) averred that, by the joint operation of the judgment in suit No. 248, and exhibit D, a trust was created, by which the title to Fort Brown Reservation and the money due for its use and occupation were vested in Stillman and Carson, for the benefit of all the parties to said suit, to be dealt with in the manner defined in the agreement, and that Stillman and Carson so accepted the title, (Art. XII, Orig. Bill, Rec. 13); and this was the understanding of Mr. James R. Cox, the attorney for Stillman and Carson in that suit, who says in his deposition, answer to 19th cross interrogatory (Rec. 499, bottom of page) that: 'While I have acted in these matters, primarily, as attorney and counsel of Stillman and the Cavazos estate, yet, subsequent to the judgment of July 14, 1887, I was certainly acting in the interest of any one who had any interest in the Fort Brown appropriation."

There is absolutely nothing in the record controverting the above facts. Appellant (defendant) Stillman took the testimony of Mr. James R. Cox, who as attorney represented him and Carson on the trial of suit No. 248, for the purpose of trying to controvert the fact that the judgment in that case was by consent; but the testimony of Mr. Cox shows conclusively that it was a *consent judgment*, no testimony being offered except by Stillman and Carson, and a formal verdict directed for them by the court without objection from the counsel of the other parties, who were then in court. (Rec. 496, 500, 501.)

IV. Plaintiff's Prayer for Relief. The substance of the prayer of the bill is: (1) That an interlocutory decree be made, requiring Stillmann and Carson to deposit the fund of $160,000.00 in the registry of the court, or pay it to a receiver, as the court might direct; (2) that the conflicting claims to the land and fund be adjudicated and settled; (3) that Stillman and Carson be enjoined from making further fraudulent use of the judgment in suit No. 248, and compelled to account for the fund with interest, and the trust created by the agreement and judgment be enforced; (4) that on final hearing a decree be entered for the payment of the fund to the claimants, found by such decree to be entitled to same; (5) prayer for process; (6) answers on oath waived, except as to two specific interrogatories touching the collection of the fund, and the agreement of July 13, 1887. (Rec. 17, 18.)

V. Pleas to the Jurisdiction. Stillman and Carson filed pleas to the jurisdiction (Rec. 71-79), which amount to a general denial, (1) of a fraudulent use of the judgment in suit No. 248, and (2) that any trust was created by said judgment and the agreement of July 13, 1887, and on these points the pleas state mere conclusions of law. The pleas were overruled by the court (Rec. 126), and the cause proceeded to a final decree.

VI. Receiver—Injunction—Interlocutory Appeal. Upon notice to Stillman and Carson (Rec. 48-59), plaintiffs made application to the court for the appointment of a receiver, injunction, and order requiring Stillman and Carson to pay the Fort Brown fund into court (Rec. 54); Carson, who is a citizen of Texas, filed answer to this motion, making defense for himself and Stillman, denying the jurisdiction of the court (Rec. 55-59); and on July 15, 1897, the court made an order (Rec. 62, 63) appointing a receiver and granting a preliminary injunction, restraining and enjoining Stillman and Carson from using the said judgment in suit No. 248 for the purpose of depriving the plaintiff and others defendants to this suit, of their interest in the Fort Brown fund, and from refusing to pay said fund into the hands of the receiver, and from refusing to account to the court for the fund. In said order (62, 63), the court having before it the record in suit No. 248, found as a fact and decreed that the court "is of opinion that the court has jurisdiction of this cause as being ancillary to suit No. 248 on the law docket of this court, and is therefore of opinion that the same should be sustained." (Rec. 62); and from said order Carson appealed to the United States Circuit Court of Appeals for the fifth circuit, and the appellate court affirmed the order appealed from, *in totidem verbis*. (See the opinion of the court of appeals, Rec. 137-146, and the mandate of that court, Rec. 133-136.)

VII. Fund Brought Under Control of Court. On May 23, 1899, the court directed Stillman to pay $50,000.00 of the Fort Brown fund into the registry of the court, and to execute his bond for $76,889.98, with surety conditioned to satisfy any decree that may be entered against him in this cause, (Rec. 354, 355); and this order was complied with (Rec. 356-379), and the fund disposed of by the final decree in this cause. (Rec. 406-415.)

BRIEF AND ARGUMENT.

First Proposition.

In order to constitute a *consent judgment*, it is not necessary that the agreement to enter it by consent should be filed as a paper in the cause, nor that the agreement and consent should be brought to the attention of the court, nor that the consent of parties should be made to appear in any manner upon the record. The consent of parties is a *fact to be proved*, like any other fact.

Authorities.

Campbell vs. Railroad Co., 1 Woods' Rep., 368, Fed. Cas. 2, 366.

Argument. In the case just cited under this proposition, the agreement to enter the decree was neither filed nor brought to the attention of the court; and Mr. Justice Bradley, in passing upon the fact of consent, said: "The very first article of the agreement is that an agreed decree be entered; this article, taken in connection with the fact that the decree was signed and entered at the first opportunity after the agreement was made, and with the evidence on the point, the inference is irresistible that the decree was signed and entered in pursuance of the agreement, and was a consent decree." In the case at bar, the *first article* of the agreement (Exhibit D., Rec. 27), is that the parties "will unite in promoting and procuring a verdict and judgment in this cause to the effect that the whole of said property, and all dues appertaining thereto, is vested in and held by James Stillman, of New York, and Thomas Carson, administrator, with will annexed, of the late Mrs. Maria Josefa Cavazos, deceased, who are reconvening defendants in said action."

The agreement begins as follows:

"Agreement, made this thirteenth day of July, 1887, between and among certain reconvening defendants in this cause.

United States Circuit Court, Western District of Texas.
Heirs of Miguel Salinas, H. E. Woodhouse, et als.,

versus

Wm. L. Kellogg, James Stillman, P. G. Cavazos, Thomas Carson and others, defendants, which is likely to be called and tried in said court tomorrow." (Rec. 26.)

Mr. Cox testifies that this agreement was signed by all the parties thereto on July 13, 1887, the day before the judgment

was entered, at Carson's office, except Woodhouse, who signed it the next morning at the court house. (Rec. 499.) The execution of this agreement is admitted by all, and Carson testifies that it was an agreed judgment (Rec. 544); and Kleburg, who was United States district attorney, on the ground representing the government, represented to the government on July 11, 1887, that the parties were "to enter agreed judgment," (Rec. 472), and subsequently reported, substantially, that it had been done. (Rec. 473.) To the same effect is the testimony of Mr. Cox; he states that no testimony was offered except by Stillman and Carson, and a verdict was formally directed for them, (Rec. 496), in the presence of the counsel of the other parties without objection from them. (Rec. 500.) This testimony of Mr. Cox proves a *consent* to the judgment in the presence of the court. There was no litigation of the issues made by the elaborate pleadings in the case. Stillman, while admitting in his answer the execution of the agreement of July 13, 1887, (Rec. 245, Art. X), denies that the judgment was by consent (Rec. 245), but it does not appear that he was present at the trial or had any personal knowledge of the fact, and, besides, plaintiffs waived an answer on oath (Rec. 18), except as to two specified interrogatories, and his answer is not evidence upon the issue of a consent judgment. (Equity Rule, 41.) The Supreme Court of Massachusetts has held that in entering a consent judgment even against an infant it is not necessary to inform the court of the agreement. (Tripp vs. Gifford, 155 Mass., 108.)

Parties to a suit have a right to agree to anything they please in reference to the subject matter of their litigation; and the courts will uphold such agreements; the parties to suit No. 248 had the lawful right to make the agreement which they did make, and Mr. Stillman cannot complain that his counsel did not bring that agreement to the attention of the court. (Railroad vs. Ketchum, 101 U. S., 289-300.)

SECOND PROPOSITION.

The agreement of July 13, 1887, and the judgment of July 14, 1887, in suit No. 248, created an express, active, special trust; the trust was created in the most formal manner, and contains all the elements usual in such trusts, viz.: (1) Fort Brown Reservation was designated as the trust estate; (2) defendants Stillman and Carson were constituted the trustees; (3) the title

to the trust estate was by the consent judgment vested in the trustees; (4) the agreement declared the trust, defined its purpose, which was to convert the trust estate into money, by conveying it to the United States, and collecting the $160,000.00 appropriated therefor, and depositing the fund to the credit of arbitrators named, to be disbursed to the parties according to their respective rights in Fort Brown Reservation and the fund as the representative of the land, when such rights should be determined and ascertained.

Authorities.

Salinas et al. vs. Stillman et al., 66 Fed. Rep., 677.
Carson vs. Combe, 86 Fed. Rep., 202.
Pomeroy's Equr. Jur., Secs. 1159, 1160.
Perry on Trusts Secs, 18, 24, 81, 82, 448.
Lewin on Trusts and Trustees, Star page 56 and note 1; Star page 108, Star page 109 and note 1.

ARGUMENT. In Salinas vs. Stillman, and Carson vs. Combe, *supra*, the United States Circuit Court of Appeals for the fifth circuit held that this identical transaction created a trust. The opinion of the court in the latter case, rendered in this suit on an interlocutory appeal, is found in the Record, 137-146. The judgment of the court in suit No. 248 was simply used as a means of conveyance, by matter of record, to vest the title to Fort Brown Reservation in Stillman and Carson as trustees, and it was competent for the parties to adopt that method of effectuating their lawful intention and agreement in regard to the property.

THIRD PROPOSITION.

The appellant (Stillman) and Carson having procured a consent judgment in suit No. 248, vesting in them a good and complete title to Fort Brown Reservation, which they conveyed to the United States, and received therefor $160,000.00, appropriated to pay for same, upon a trust declared and defined in the agreement of July 13, 1887, which expressly reserved the decision and determination of the conflicting claims of the parties to Fort Brown Reservation and the said fund of $160,000.00 until after it should be collected, and required Stillman and Carson to deposit said fund in a bank in Texas to the credit of named arbitrators, who should decide and determine the conflicting claims of the parties to the fund, and disburse it accord-

ingly, and the deposit of said fund with arbitrators with power to decide the claims thereto as aforesaid being the consideration upon which Stillman and Carson procured said consent judgment, and said fund having been after its collection transmitted by the agent of Stillman and Carson to New York and paid over to Stillman, who converted the whole of it to his own use and repudiated his trust, they, Stillman and Carson, were thereby guilty of making an unjust, inequitable and fraudulent use of said judgment, and were guilty of making a fraudulent use of the process of the court which rendered the judgment, and were guilty of violating the plain and essential provisions of the agreement by which they procured the consent judgment and obtained possession of the fund, and were guilty of a breach of the trust created and devolved upon them by the joint operation of said judgment and agreement; and, therefore, under the principles repeatedly announced by this court in its decisions, the Circuit Court in which the consent judgment was rendered is vested with ancillary jurisdiction to entertain this suit in equity for the purposes of granting to the other parties to the former suit and their privies equitable relief against the aforesaid unjust, inequitable and fraudulent use of said judgment and the process of the court that rendered it, and the violation of said contract, and the breach of said trust, and to determine the conflicting claims of the parties to said fund, and to compel appellant to account for the trust fund converted by him and pay the same over to the parties found to be entitled to it, and to secure to the parties the fruits, benefits and advantages of the proceedings and judgment in the former suit, and to regulate the operation of said judgment by engrafting a trust upon it.

Authorities.

Krippendorf vs. Hyde, 110 U. S., 276, 287.
Pacific R. Co. vs. Missouri P. R. Co., 111 U. S., 505.
New Orleans vs. Fisher, 180 U. S., 185, 199.
Pennock vs. Coe, 23 How., 117.
Clark vs. Mathewson, 12 Pet., 164.
Dunn vs. Clark, 8 Pet., 1.
Jones vs. Andrews, 10 Wall., 327.
Root vs. Woolworth, 150 U. S., 401.
Freeman vs. Howe, 24 How., 450.

Milwaukee, etc., R. R. Co. vs. Soutter, 2 Wall., 609, 645.
Hatch vs. Dorr, 4 McLean, 112; Fed. Cas., 6206.
Babcock vs. Millard, Fed. Cas., 699.
Dunlap vs. Stetson, 4 Mason, 349, Fed. Cas., 4164.
The Cortez Co. vs. Tannhauser, 9 Fed. Rep., 226.
Bank vs. Leland, Fed. Cas., 9452.
Thompson vs. McReynolds, 29 Fed. Rep., 657.
Lamb vs. Ewing, 54 Fed. Rep., 272.
Bank vs. Turnbull, 16 Wall., 190.

ARGUMENT. Was appellant guilty of a fraudulent use of the judgment and the process of the court which rendered it? It does not require a great multiplicity of acts and facts to constitute a fraud. Appellant's title would not have been accepted by the government and the appropriation paid to him but for the consent judgment. (See opinion of the attorney-general, Rec. 474-478.) He procured that judgment by binding himself to collect the fund, and then to deal with it as stipulated in the agreement of July 13, 1887; armed with the judgment, he and Carson made their deed to the government and collected the fund, and then appellant converted the whole of it. (See his answer, where he states an account in which he appropriates the whole of it, Rec. 265-269.) These facts are undisputed. If they do not constitute a fraudulent use of the judgment, it would be difficult to make an improper use of the judgment of a court. In the Milwaukee and Minnesota Railroad Co. vs. Soutter, 2 Wall., 609, 645, an ancillary bill was sustained upon the ground that an unjust advantage had been obtained by one party over another by a perversion and abuse of the orders of the court. The ground of jurisdiction was the wrongful use of the process and orders of the court.

Under the above authorities, the following kinds or classes of bills are ancillary:

A bill filed to continue a former litigation in the same court, or which relates to some matters already partly litigated in the same court, by the same parties or their representatives, standing in the same interest; or which seeks to obtain any equitable relief in regard to, or connected with, or growing out of any judgment rendered at law in the same court; or to secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court, by the same parties, or

privies, standing in the same interest; or which seeks to prevent a party from using a judgment of the same court for fraudulent purposes, or to restrain a party from using a judgment to perpetrate an injustice, or to obtain an inequitable advantage over other parties to the judgment.

The jurisdiction of ancillary bills does not depend upon matters apparent upon the face of the record in the former suit; but such jurisdiction may, and often does rest upon facts *dehors* the record in the former suit. The suit in this case was brought for the following objects and purposes: (1) To continue the former litigation and controversy which was embraced in and partly litigated in suit No. 248, by the same parties. It is alleged in the original bill (Rec. 9, 10), and proved by the agreement exhibit D. (Rec. 27, 28), that the parties stipulated that, in the trial of suit No. 248, the issues made by the pleadings therein should not be litigated nor adjudicated, but a consent judgment should be rendered, vesting the title to Fort Brown in Stillman and Carson, who should convey it to the government and collect the fund, and then the claims of the parties, being transferred from the land to the fund, should be determined, and the fund disbursed; and the evidence shows, indisputably, that the plan as agreed upon was carried out to the letter, so far as to enable Stillman to get possession of the fund which he at once converted. The pleadings in this case and the pleadings in the former case show that the issues in the two cases are identical; this is a continuation of the former controversy, and no reasoning can explain away the fact. (2) This suit is brought to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in the former suit. It is alleged in the original bill (Rec. 13), and proved by the agreement exhibit D. (Rec. 26, 27), that the title to Fort Brown was by the judgment in the former suit vesed in Stillman and Carson in trust for the use and benefit of all the parties to the former suit, and that they, Stillman and Carson, so accepted the title to the property as trustees for the benefit of all the parties, that they might be able to convey a good and valid title to the government, and thereby secure and collect the fund of $160,000.00, and have it forthcoming to be paid to the parties found to be the owners of the land. It follows, then, that the former judgment was rendered for the benefit of all the parties to the suit, and the fruits of that judgment, as anticipated and stipu-

lated by all, was the production of the fund in Texas to satisfy the demands of all just claimants. That result was frustrated by the wrongful act of appellant, and this suit was brought to secure the result intended to be accomplished by the consent judgment. (3) This suit is brought to prevent appellant from using the consent judgment in the former suit to perpetrate injustice and fraud, and to obtain an inequitable advantage over the other parties to the judgment. (See original bill, Art. XIII, Rec. 13-15, and the prayer of the bill, Rec. 17, 19.) (4) This suit is brought to engraft a trust on the consent judgment. (Original bill, Art. XII, Rec. 13, exhibit D., 266-29.) (5) This suit is brought to obtain equitable relief in regard to and connected with and growing out of the judgment in the former suit. (6) The issues presented for trial by the pleadings in this present suit arise out of the record, proceedings and judgment in the former suit. In the determination of the present suit, the lower court was required to review and act upon the record, proceedings, and judgment in the former suit, and to investigate the facts and to act judicially upon the controversy, rights, titles and interests involved in the former suit.

It is submitted that, the purposes of this suit, as here enumerated, and which are by the record indubitably shown to inhere in the suit, are abundantly sufficient to bring the case within the above cited authorities, as ancillarry to the former suit, and to sustain the jurisdiction of the court.

Fourth Proposition.

The Circuti Court having, in its interlocutory decree of July 15, 1897, (Rec. 62-63), found, as a fact, and so decreed, that it, the said Circuit Court, "has jurisdiction of this cause as being a suit ancillary to said cause, No. 248 on the law docket of this court," and said decree of July 15, 1897, having been, on appeal by Carson prosecuted for the benefit of himself and his co-trustee, Stillman, affirmed *in totidem verbis*, by the United States Circuit Court of Appeals of the Fifth Circuit, as appears by the mandate of that court, (Rec. 133-136), whose judgment remains unreversed, the said Circuit Court was bound to and did execute said mandate and retain jurisdiction of the cause and proceed to final decree in accordance with the mandate of the appellate court; and, therefore, no appeal will lie upon the question of jurisdiction from the final decree in this cause, and this appeal should be

dismissed. If the Circuit Court of Appeals erred in its judgment affirming the said decree of the Circuit Court of July 15, 1897, the appropriate remedy lay in a certiorari from this court to that court.

Authorities.

Aspen Mining and Smelting Co. vs. Billings, 150 U. S., 31-38.

Stewart vs. Solomon, 97 U. S., 361.

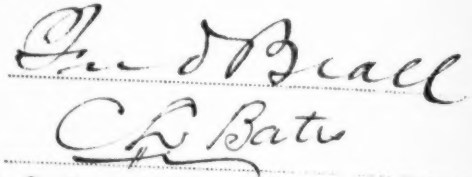
Texas & P. R. Co. vs. Anderson, 149 U. S., 237.

Argument. It is averred in the bill that Carson is a citizen of Brownsville, Cameron County, Texas; that he is insolvent, and that he is the duly and lawfully authorized agent of Stillman in Texas, and represents their mutual interests in resisting all efforts of the claimants to compel an accounting by them of the trust fund of $160,000.00 (Rec. 16), and that they are fraudulently conspiring together to prevent a distribution of the fund to the owners. (Rec. 14.) These allegations are proved by the conduct of Stillman and Carson both before and after this litigation began. Although Carson claimed that his testatrix owned one-half the fund in question, he gave to John A. Garver, appellant's New York attorney, a power of attorney to collect and receipt for him for the fund, without taking any precautions to secure the part of the fund claimed by him. (Rec. 35, 91, 225.). And throughout this litigation Carson has acted in concert with Stillman to defeat the jurisdiction of the court, and prevent an accounting for the fund, although Carson claimed that his testatrix, whose estate was being administered in the probate court of Cameron County, Texas, owned one-half the fund. The pleas, demurrers, answers and other pleadings of Stillman and Carson are substantial duplicates of each other throughout this record. The first paper filed in the case by Carson was his answer to the rule to show cause why a receiver should not be appointed and an injunction granted (Rec. 55-59); at that time Stillman had been served with a subpoena and also with notice of the application to appoint receiver and grant injunction (36-54), but had not appeared in the cause at that time. But Mr. Carson appeared and answered the rule (Rec. 55-59) attacking the jurisdiction of the court in a most elaborate pleading, and his contention being overruled he appealed to the Circuit Court of Appeals; and the state of the record can leave no doubt upon the mind that he prosecuted that appeal for the benefit of Stillman, and he should

be bound by the result. The defense outlined in Carson's answer to the rule (55-59) was subsequently embraced in the plea of Stillman and Carson to the jurisdiction (Rec. 71-79), and throughout this litigation they have made common cause, as the record fully shows.

It is respectfully submitted that the lower court had jurisdiction to entertain this suit as ancillary to suit No. 248, and the decree should be affirmed; or if the court should be of opinion that appellant is concluded upon the question of jurisdiction by the judgment of the United States Circuit Court of Appeals, then it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,



Counsel for C. B. Combe, Independent Executor of Stephen Powers, Deceased; C. B. Combe, et al., Appellees.

